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No. 82-1641

In the Supreme Court of the United States

October Term, 1982

KEMMONS WILSON,
Petitioner,

vs.

W. HAMILTON CRAWFORD, LILLIAN W. CRAWFORD, MACK H. HORNBEAK, DOROTHY C. KIMBALL AND COVINGTON FUNDING COMPANY,
Respondents.

CRAWFORD CORPORATION,
Petitioner,

vs.

W. HAMILTON CRAWFORD AND LILLIAN W. CRAWFORD,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Respondents will respond only to those questions presented for review in the Petition for Certiorari.

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OPINIONS BELOW

1. *Crawford v. Wilson; Hornbeck v. Wilson; Kimball v. Wilson;* and *Crawford Corporation v. Crawford,* No. 81-5066; *Wilson v. Covington Funding Co.,* No. 81-5067 (6th Cir. Nov. 24, 1982) (6th Cir. Jan. 4, 1983, order denying petition for rehearing).

COUNTER-STATEMENT OF THE CASE

Respondents have no quarrel with pages 3 and 4 of the Statement of the Case contained in the Petition for Certiorari. Respondents, however, feel obliged to point out that the perception by the Petitioners of the nature of the case did not change at any time prior to the filing of this Petition.

These cases were filed beginning in June, 1977 and Petitioners failed to make a timely request for a jury trial under Rule 38(b) F.R.C.P. It was not until December, 1979 that Petitioners requested a jury trial pursuant to Rule 39(b) F.R.C.P.

Petitioners claim that their concept of the case changed during preparation for trial. The fact is that the restatement of the balance sheet footnoted on page 5 of the Petition which Petitioners allege as a principal reason for this change of perception occurred in 1975 and related to the 1973 balance sheet. Petitioners were well aware of this more than two years prior to the institution of litigation.

Although the Petition states that the Respondents moved away from "these technical concepts", this was not the position which the Petitioners took at the time of the trial. The Petitioners produced as witnesses a number of Certified Public Accountants all of whom testified in great detail about the application of "generally accepted accounting principles" to this case. One of the assignments of error that the Petitioners asserted in their appeal to the Court of Appeals was that the trial court had erred in refusing to decide whether the treatment of certain items in particular financial statements was in accordance with generally accepted accounting principles. The brief states on this point:

> "The trial court was clearly erroneous in refusing to decide the issue of whether the December 31, 1973 financial statements were prepared in accordance with generally accepted accounting principles, in the light of the importance of the financial statements to the transaction. . . . There was no more central an issue to the litigation than the question of or correctness of the financial statements."

The Respondents never requested that the Petitioners proceed as plaintiffs in these consolidated cases. In point of fact, at a pre-trial conference, the Respondents advised the District Court that the promissory notes at issue, which by their terms were in default, would be introduced into evidence and Respondents would then rest. This simply placed on Petitioners the burden of going forward with evidence as to these affirmative defenses.

ARGUMENT

I.

The Petition flatly misstates the attitude of the District Court toward the method of selecting juries and the alleged contract between "juries these days" and juries called upon for service in the past. The Court simply stated at the oral argument of the motion "we get our juries these days by random selection from voter registration lists, and for most cases the court would say that these people are fine." The Court then proceeded to state that, in a case involving complicated business transactions, the jurors do not have the necessary familiarity with business and business terminology to deal with the issues. In its order denying the motion for jury trial, the Court stated: "It is the opinion of the court that a jury trial should not be granted because the cases involve business transactions of considerable complication which would be outside the knowledge or experience of the average juror."

It is difficult to see how the Petitioners can deduce from this statement that a jury trial was denied in this case "solely on the ground that the Jury Selection and Service Act of 1968 produces incompetent jurors." In fact, it is clear the District Court did not deny a jury trial on the ground that the Jury Selection and Service Act of 1968 produces incompetent jurors.

II.

The District Court in its order denying the motion for a jury trial stated, "this Court agrees that, even where a jury trial is not timely demanded, it should be granted unless there is an affirmative and good reason not to so grant a jury trial." The order of the District Court was affirmed by the Court of Appeals for the Sixth Circuit

which is designated in the Petition as one of a number of Circuits which takes the view that "a trial court should grant a Rule 39(b) motion in the absence of strong and compelling reasons to the contrary." The Court of Appeals for the Sixth Circuit necessarily applied its own standard in affirming the order of the District Court. It, therefore, adopted the position which, according to the Petition, reduces the discretion of the District Court in denying the motion and is precisely the position which is advocated in the Petition.

Petitioners' request for a uniform standard to be enunciated by this Court would not result in any relief being granted to Petitioners nor result in uniformity among the Circuits without removing from Rule 39(b) the discretionary power of the District Courts. It would appear that the exercise of discretion by the District Court necessarily involves an analysis of the issues to be tried by such court.

In this case, the failure of the Petitioners to demand a jury trial was a deliberate decision. They subsequently decided that it would be "good trial tactics" to request a jury trial. The Court of Appeals for the Sixth Circuit, in affirming this exercise of discretion by the District Court, applied its own standard which requires that a motion be granted in the absence of a good cause shown. The Court found that the reason for denying the motion stated by the District Court in its order constituted good cause. Since the strongest pro-jury position was applied by the District Court and by the Court of Appeal, the granting of the Petition in this proceeding would not resolve any conflict among the Courts of Appeals.

There is no conflict among the Courts of Appeals as to Rule 39(b) F.R.C.P. The Courts of Appeals in dealing with specific cases before them have merely phrased differently the scope of the District Court's discretion.

CONCLUSION

It appears that the Petitioners have attempted to create issues before this Court which are not issues normally presented to this Court for review. Certainly, there is no valid argument that the jury trial in this case was denied solely on the ground that the application of the Jury Selection and Service Act of 1968 produces incompetent jurors.

The second issue presented was the proper standard for the exercise of the District Court's discretion deciding when to grant trial by jury. Petitioners seek no specific relief. Where, as here, the Court of Appeals for the Sixth Circuit and the District Court have applied the strictest standard as to when a jury trial may be denied after the time has expired for demanding a jury trial as a matter of right, there is no issue as to which a Writ of Certiorari may be granted.

Respectfully submitted,

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